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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PORT HOUSTON MARINE, INC.,
Petitioner

v.

DOCKSIDE TERMINAL SERVICES, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

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QUESTION PRESENTED

Can a non-vessel obtain indemnity for its own negligence from an employer covered under the Longshoremen's and Harbor Workers' Compensation Act based upon an implied indemnity agreement when there is no written contract between the parties or any circumstances giving rise to the non-vessel's liability without fault?

LIST OF PARTIES

The names of all parties to the proceedings in the Supreme Court of Texas are contained in the caption of the case in this Court.

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OPINIONS BELOW

The Supreme Court of Texas' refusal of the application for a writ of error is reproduced in the Appendix hereto at A-2. The opinion of the Court of Appeals for the First Supreme Judicial District of Texas, Houston, Texas, appears in the Appendix at A-4. The order of the 113th Judicial District Court of Harris County, Texas, granting petitioner's motion for summary judgment appears in the Appendix at A-9.

JURISDICTION

Petitioner's application for a writ of error was refused by the Supreme Court of Texas on February 22, 1984.

The statutory provision conferring jurisdiction on this Court to review the decision in question by writ of certiorari is 28 U.S.C. § 1257(3).

STATUTES INVOLVED

Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), provides as follows:

> "In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act."

STATEMENT OF THE CASE

Ralph Barrios, a ship repairman employed by petitioner, Port Houston Marine, Inc. ("Port Houston"), filed a personal injury action against Dockside Terminal Services, Inc. ("Dockside") and Lone Star Shipping, Inc. ("Lone Star") pursuant to Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), (The "Act") alleging that the defendants' negligence caused his injuries.

Dockside filed a third party action against Port Houston, claiming breach of an alleged oral contract for services and seeking indemnity from Port Houston as consequential damages. Dockside did not allege the existence of an express or implied contract of indemnity and, in its brief in the Court of Appeals, affirmatively stated that no such contract existed between the parties.

The 113th Judicial District Court of Harris County, Texas, granted petitioner's motion for summary judgment and Dockside's third party action was severed from the plaintiff's action. The Texas Court of Appeals, First Supreme Judicial District, reversed, holding that there was evidence of an implied contract of indemnity between Port Houston and Dockside and that Section 5 of the Act did not provide immunity to Port Houston from the claim of Dockside.

Petitioner's application for writ of error to the Supreme Court of Texas was refused.

A brief summary of the essential facts upon which the petitioner's motion for summary judgment was granted is necessary at this point.

The plaintiff, Ralph Barrios, was injuried on the M/V LAREDO while employed as a ship repairman by Port Houston. The plaintiff received compensation and medical benefits pursuant to the Act.

Captain Eddie Tong, the operations manager for both Dockside and Lone Star, testified by affidavit and deposition in this case that Dockside, Lone Star and the M/V LAREDO are commonly owned, at least in part, by Pete Grana. Captain Tong works simultaneously for both Dockside and Lone Star. Lone Star is the agent for the M/V LAREDO in Houston.

Captain Tong, on behalf of Lone Star, contacted several companies, including Port Houston, to obtain the best price for the installation of a crane pedestal on the M/V LAREDO. Captain Tong advised Port Houston that Lone Star would provide a shoreside crane to lift the pedestal onto the vessel. Port Houston was given the job of installing the crane pedestal on the LAREDO.

Captain Tong sent an employee of Dockside and a Dockside crane to lift the pedestal onto the vessel. It was a common practice for Dockside to provide cranes and crane operators at no cost to vessels owned by Grana. Dockside did not bill Lone Star for the use of the crane, nor did Dockside bill Port Houston.

There was never any express agreement between Captain Tong and Port Houston that Port Houston would supply a flagman for Dockside's crane, nor was there any oral or written contract between Dockside or Lone Star and Port Houston.

REASONS FOR GRANTING THE WRIT

The decision of the Texas Court of Appeals, which the Supreme Court of Texas refused to review, implies an indemnity agreement into every contract between employers covered under the Act, and non-vessels. In the circumstances of this case, the decision would allow Dockside indemnity from Port Houston even though the sole basis of Dockside's potential liability is its own negligence. Even the indemnity right of vessels against covered employers fashioned by this Court in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), and eliminated by the 1972 amendments to the Act, did not extend so far.

If the decision of the Texas Court of Appeals is allowed to stand it will effectively nullify the exclusive liability provisions of Section 5 of the Act in cases involving non-vessels.

I.

THE DECISION OF THE TEXAS COURT OF APPEALS CONFLICTS WITH FEDERAL MARITIME LAW

The indemnity right created by the Texas Court of Appeals in this case would allow a non-vessel to recover indemnity from an employer covered under the Act even in cases where the sole basis of the non-vessel's liability is its negligence.

It is well settled under federal maritime law that before a party can be indemnified for its own negligence there must be a written indemnity agreement which clearly and unequivocally requires that result. *Roberts v. Williams-*

McWilliams Co., Inc., 648 F.2d 255 (5th Cir. 1981); *Wedlock v. Gulf Mississippi Marine Corp.*, 554 F.2d 240 (5th Cir. 1977); *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge MR. CHARLIE*, 424 F.2d 684 (5th Cir. 1976). Contrary to these precedents, the decision in the case at bar allows a joint tortfeasor to obtain indemnification for its own negligence with no written contract at all, based upon an implied contract of indemnity. As the court in *Wedlock, supra*, stated:

> "A party may contract against liability for its own negligence, but such an agreement must clearly indicate the intention of the parties. It may not be presumed that a mere agreement to indemnify includes indemnity for the indemnitee's own negligence." 554 F.2d at 241, n. 2.

Though other courts are not willing to imply an agreement to indemnify for the indemnitee's own negligence, even where an express written contract exists, the Court of Appeals has done so by first implying an indemnity agreement in an alleged oral contract between Dockside and Port Houston and then further implying in that implied agreement a duty by Port Houston to indemnify Dockside for Dockside's own negligence. As Petitioner will show *infra*, the well-settled rule in federal maritime cases is that contractual indemnity is implied only where the liability for which the indemnitee is seeking indenmity is based on no-fault liability, such as the warranty of seaworthiness. The cases cited by the Court of Appeals, *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714 (2d Cir. 1978) and *Holden v. Placid Oil Company*, 473 F. Supp. 1097 (E.D. La. 1979) both involved no-fault liability of the indemnitee; the indem-

nitees in those cases were not being sued for negligence. Dockside, on the other hand, has been sued by the plaintiff only for negligence. While courts, through the use of the implied contractual indemnity doctrine, have permitted parties held liable on no-fault grounds to pass along that liability to a party actually at fault,[1] no other court, to Petitioner's knowledge, has ever used the doctrine of implied contractual indemnity to permit an indemnitee to be indemnified for its own negligence, and attempts to so extend the doctrine have been clearly rebuffed in numerous federal decisions, cited *infra*.

Plainly, in order to obtain indemnity, the indemnitee must be liable to a third party. If Dockside was not negligent and is not liable to the plaintiff, as it claims, then it has a perfect defense to the plaintiff's suit, because the only theory of recovery advanced by the plaintiff is the negligence of Dockside. On the other hand, if Dockside is found liable, it will be because it was negligent. If Dockside was a joint tortfeasor, it clearly is not entitled to pass its liability along to Port Houston by means of an implied contract of indemnity. A party who maintains, as Dockside does, that it is not liable at all, is *not* seeking indemnity; it is seeking to substitute another party in its place.[2] It is readily apparent that the Court of Appeals, decision would enable Dockside to obtain indemnity for its own negligence based upon an implied contract of indemnity.

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1. Such as the vessel's violation of the duty of seaworthiness in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), which will be discussed more thoroughly *infra*.

2. *See, White v. Johns-Manville Corp.*, 662 F.2d 243, 250 (4th Cir. 1981).

For decades, parties who have been sued by longshoremen have attempted, first by one theory and then another, to pass on all or part of that liability to the longshoremen's employers. In the case of *Halcyon Lines v. Haenn Ceiling and Refitting Corp.*, 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318 (1952), this Court ruled there could be no contribution from an employer in a longshoreman's action against a negligent third party because the common law did not permit contribution among joint tortfeasors. Further, the Court ruled Section 5 of the Act provided that the exclusive liability of an employer covered under the Act to the longshoreman or to third parties was the payment of benefits under the Act. That decision was reaffirmed in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974). These cases made it clear that tort-based indemnity or contribution is not available from an employer covered under the Act.

In the present case, Dockside could not recover tort-based indemnity or contribution, per *Halcyon* and *Cooper Stevedoring, supra*. The only other type of indemnity is contractual, either express or implied. Captain Tong testified unequivocally that there was no express contract of indemnity between the parties. Putting aside for the moment Dockside's argument that indemnity is available as consequential damages for the breach of an ordinary contract, the only possible theory of recovery left to Dockside is implied contractual indemnity, the theory upon which the Court of Appeals relied. The problem with the Court of Appeals' reasoning, however, is its implicit conclusion that every contract includes a contract of indemnity, and not only that, but a contract of indemnity which extends so far that it requires indemnification

for the indemnitee's own negligence. The Court of Appeals has, in effect, created an abberation of *Ryan* implied contractual indemnity between stevedores and non-vessels, without the sound foundation underlying that doctrine.

This Court first gave vitality to the theory of implied contractual indemnity in maritime cases in *Ryan, supra.* Two questions were presented to the Court in *Ryan*: (1) does Section 5 of the Act bar a contractual indemnity action against a covered employer, based on an express or implied contract of indemnity, and (2) should a contract of indemnity be implied between a vessel and a stevedore? The court found Section 5 of the Act was not a bar to contractual indemnity and implied an indemnity agreement in contracts between vessels and stevedores. The indispensable predicate for that decision was the vessel's absolute liability without fault, by reason of the seaworthiness doctrine. The Court of Appeals in the case *sub judice* has overlooked that crucial basis for the development of the *Ryan* doctrine. The Court of Appeals' statement at page 3:

> "That contract [for Dockside to furnish a crane and operator to Port Houston] allegedly included a provision, implied by industry practice, for Port Houston to furnish a flagman. Hence, liability would attach to Port Houston for any damages caused by a breach of that provision. This is evidence of an implied contract of indemnity." (parenthetical expression added).

demonstrates a misunderstanding of the law of contracts in general and the law of contractual indemnity in particular. If the position of the Court of Appeals were

correct, this Court in *Ryan* would not have addressed the second question; the Court would have simply noted that every contract contained an implied indemnity agreement, no matter whether the basis of liability was strict liability or negligence. Hence, there would be no need to limit implied contractual indemnity to cases where the indemnitee's liability is premised on a no-fault ground, as was done in *Ocean Drilling & Exploration Co. v. Berry Bros. Oilfield Service, Inc.*, 377 F.2d 511 (5th Cir. 1967), *cert. denied*, 389 U.S. 849, 88 S.Ct. 102, 19 L.Ed.2d 118 (1967). The *Berry Bros.* case is directly on point and directly contrary to the Court of Appeals' decision. In fact, if the position of the Court of Appeals is correct, then the rule in express contractual indemnity cases against implying agreements to require indemnification for the indemnitee's own negligence is obviously wrong, because every ordinary contract, according to the Court of Appeals, contains an implied indemnity agreement that requires indemnity even for the consequences of the indemnitee's negligence.

The party seeking indemnity in *Berry Bros., supra*, took exactly the same position taken by the Court of Appeals in the present case, and the Fifth Circuit, in an opinion by Judge Brown, explained very lucidly why contractual indemnity could not be implied where the basis of the indemnitee's liability to the planitiff was the indemnitee's own negligence:

> "While freely implemenitng this contractual obligation of the stevedore to indemnify the shipowner in accordance with the liberal spirit of *Ryan*, we have hesitated, however, to extend it beyond those controversies involving the 'special rules governing the obligations and liability of shipowners' which neces-

> sitated its formulation and justify its application. Without attempting to define all of the possible limitations that might properly be placed upon its scope, it is sufficient to state that we are likewise unable to discover any compelling reason to justify the extension of that shipowner-stevedore originated rule to the facts of this controversy." 377 F.2d at 513 (Footnotes omitted).

The court noted that the rig owner, ODECO, could not be liable for unseaworthiness, because the platform was not a vessel. Thus, the "special rules governing the obligations and liability of shipowners" did not come into play. ODECO, like Dockside in the present case, would be liable, if at all, solely on the basis of its own negligence. The court concluded:

> "The injured employees are thus not entitled to the warranty of seaworthiness and must rely solely upon the establishment of some independent act of negligence on the part of ODECO as a basis for recovery. This controversy therefore appears to involve none of the factors calling for the application of those special rules governing the obligations and liability of shipowners to seamen. The claims against ODECO are based purely and simply on tort principles, see *Pure Oil Co. v. Snipes*, 5th Cir. 1961, 293 F.2d 60, and cannot be properly viewed as involving any breach by Berry Bros. of an implied warranty of workmanlike service." 377 F.2d at 513.

The reasoning of the Court in *Berry Bros.* has been consistently followed since its rendition in cases arising before and after the 1972 amendments to the Act. *Gator Marine Service Towing, Inc. v. J. Ray McDermott & Co.*, 651 F.2d 1096 (5th Cir. 1981); *White v. Texas Eastern Transmission Corp.*, 512 F.2d 486 (5th Cir. 1975);

Wellington Transportation Co. v. United States, 481 F.2d 108 (6th Cir. 1973); *Hobart v. Sohio Petroleum*, 445 F.2d 435 (5th Cir. 1971), *cert. denied*, 404 U.S. 942, 92 S.Ct. 288, 30 L.Ed.2d 256 (1971); *Transcontinental Gas Pipe Line, supra; Schwartz v. Compagnie General Transatlantique*, 405 F.2d 270 (2d Cir. 1968); *Hamilton v. Mesa Petroleum Co.*, 495 F. Supp. 718 (E.D. La. 1980); *Avondale Shipyards, Inc. v. The VESSEL THOMAS E. CUFFE*, 434 F. Supp. 920 (E.D. La. 1977).

The court in *Hobart, supra*, wrote:

> "Our reading of the many cases decided in this Circuit involving the *Ryan* doctrine convinces us that the predicate of the doctrine is the shipowner's absolute nondelegable liability under the seaworthiness guaranty." 445 F.2d 439.

After reviewing the many cases from the Fifth Circuit that denied implied contractual indemnity in the absence of no-fault liability of an indemnitee, the court in *Hobart* held:

> "We therefore decline Sohio's invitation to extend the Ryan doctrine to a shipper who, as the result on the merits in the instant action between plaintiffs and Sohio reflects, owes no more than an ordinary duty to act as would a reasonably prudent person." 445 F.2d 439-440.

The court in *Schwartz, supra*, held:

> "The courts have recognized that the doctrine of seaworthiness, which creates liability without fault, places an extremely heavy burden of liability on the shipowner. Indemnity is permitted the shipowner because his reliance upon an independent contractor frequently results in the shipowner's vicarious lia-

bility for injuries without fault. See *DeGioia v. United States Lines Company*, 304 F.2d 421 (2d Cir. 1962).

> "Since any equitable considerations underlying the decision of the courts to require indemnity by applying the implied warranty of workmanlike service are ultimately derived from a shipowner's liabilities under the seaworthiness guarantee, where there is no such possible liability, as in this case, there can be no requirement of indemnity under the warranty doctrine.
>
> "The fact that a shipowner may be found liable to plaintiff due to the ship's negligence is hardly an injustice *per se* requiring this court to invoke an artificial equitable doctrine of indemnity. The shipowner is obligated to pay plaintiff only if it was negligent . . ." 405 F.2d 276.

Like the defendants in the cases of *Berry Bros.*, *Hobart*, and *Schwartz, supra*, Dockside will be liable, if at all, because of its own negligence, not because it owed the plaintiff a strict liability or no-fault type of duty. If Dockside is liable to the plaintiff because of its negligence, then the underlying basis for the application of *Ryan* type indemnity does not exist. Neither Dockside nor the Court of Appeals has cited a single case from any jurisdiction which permitted a negligent indemnitee in an implied contractual indemnity action to obtain indemnification for its own negligence. Any such decision would constitute a radical departure from settled legal principles of federal maritime law and would be a revolution in the law of indemnity—and that is precisely what the decision of the Court of Appeals in the case constitutes.

The case of *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981), upon which the Court of Appeals

purported to rely, addressed the narrow question whether the 1972 amendment to Section 5 of the Act barred express or implied contractual indemnity actions by non-vessels against stevedores. The court correctly ruled that subsection (b), added by the 1972 amendments, eliminated the *Ryan* triangle (longshoreman vs. vessel vs. stevedore) only in vessel cases. The court ruled that the 1972 amendment did not prohibit express or implied contracts of indemnity between non-vessels and stevedores. The decision in *Pippen*, however, was premised on the existence of an express or implied contract of indemnity. An implied contract of indemnity might arise, for example, where the employer was the manufacturer or seller of goods that injured the employee, for which the party seeking indemnity could be held liable on a no-fault basis. That was the theory in *Zapico*[3] and *Holden, supra*. But as in *Zapico*, the court in *Pippen* held that there was no implied contract of indemnity between the party seeking indemnity and the employer. Contrary to the Court of Appeals' interpretation, the court in *Pippen* did not hold that every contract between a stevedore and a non-vessel contains an implied contract of indemnity. To have done so would have been a repudiation of *Berry Bros.* and the long line of cases following that decision.

The crux of the Court of Appeals' faulty reasoning is its statement that a breach of the alleged agreement to provide a flagman subjects Port Houston to "any damages" caused by a breach of that provision, including,

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3. The prospective indemnitee in *Zapico* was a manufacturer who argued that the user of the product impliedly warranted to use the product safely and that failure to do so entitled the manufacturer to indemnity. The court rejected the argument. The same theory was proposed and rejected in *White v. Texas Eastern*, supra.

apparently, indemnity for injuries to third parties caused by Dockside's own negligence. That decision is, in essence, a holding that consequential damages for breach of contract includes the right to indemnity for one's own negligence.

It is elementary, however, that no consequential damages of any kind are recoverable in a breach of contract action unless it can be shown that those damages were in the contemplation of the parties at the time the contract was made. *11 Williston on Contracts* § 1344 (3d ed. 1968).[4] The doctrine of implied contractual indemnity arose as an exception to the rule that damages caused to a third party are not recoverable damages in a contract action. Courts that employ the doctrine reason that if the contracting parties had considered the matter, they would have agreed that one party would indemnify the other party in the circumstances presented. *In Re Oil Spill by the AMOCO CADIZ*, 699 F.2d 909, 915 (7th Cir. 1983). An obvious limitation on that doctrine is that no court will assume that one party would have agreed to indemnify the other for the other's own negligence. Thus, the rule is stated as follows:

> It is a well-recognized rule that an implied contract of indemnity arises in favor of a person who without any fault on his part is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, the former having a right of action against the latter for indemnity, provided they are not joint tortfeasors . . . .
>
> 42 C.J.S., Indemnity, § 21, p. 596.

4. *See, e.g., Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 23 S.Ct. 754, 47 L.Ed. 1171 (1902); *Greenfield v. Globe Automatic Sprinkler Co.*, 285 F. 27 (5th Cir. 1922).

What an inexplicable contradiction it would be to hold on the one hand that where there is an express contract of indemnity there can be no presumption that the indemnitor agreed to indemnify for the indemnitee's own negligence unless the language clearly and unequivocally requires that result, while on the other hand holding that where there is no express indemnity agreement, an indemnity agreement will be implied whereby the indemnitee will be indemnified for the consequences of its own negligence.

Thus, it is clear that the decision of the Court of Appeals conflicts with settled federal maritime law and creates new and far-reaching indemnity rights against employers covered under the Act without the no-fault liability which was the predicate for the creation and application of *Ryan* indemnity.

Because this decision creates, out of whole cloth, a revolutionary new substantive right against employers protected under the Act, contrary to existing federal maritime law, this Court should grant certiorari.

II.

THE DECISION OF THE TEXAS COURT OF APPEALS EFFECTIVELY ABOLISHES THE EXCLUSIVE LIABILITY PROVISIONS OF SECTION 5 OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT IN CASES INVOLVING NON-VESSELS

The decision of this Court in *Ryan, supra,* in essence abolished the exclusive liability provisions of Section 5

of the Act in cases involving vessels.[5] As a result, indemnity acitons were filed against employers in almost every case.

Congress, in amending Section 5 of the Act in 1972, abolished the warranty of seaworthiness as to longshoremen and noted:

> "The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover damages for which it is liable to the injured worker from the stevedore or other employer of the worker."[6]

The *Ryan* doctrine, which Congress put to rest as to vessels, has been resurrected by the Texas Court of Appeals as to non-vessels. If the decision is allowed to stand, it will create the same problems which *Ryan* generated. The Texas Court of Appeals has, in ef-

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5. The Court technically held that the vessel owner's recovery was based on a contractual right to indemnity, not "on account of" the injury and therefore was not within the statutory prohibition. 350 U.S. at 130.

6. H.R. REP. No. 1441 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4698, 4704.

fect, abolished the exclusive liability provisions of Section 5 of the Act in all cases involving non-vessels. Thus, non-vessels, which are liable to injured longshoremen for negligence, can now obtain *Ryan*-type indemnity from employers covered under the Act. Clearly, all non-vessels sued by longshoremen will take advantage of this new cause of action and file indemnity claims against the longshoreman's employer in virtually every case.

The rights of non-vessels to indemnity from employers covered under the Act is an important question of federal maritime law which should be decided by this Court. The decision, if allowed to stand, will have a significant adverse effect on employers covered under the Act in actions filed by longshoremen against non-vessels pursuant to Section 5 of the Act. Accordingly, this Court should grant certiorari.

CONCLUSION

The decision of the Texas Court of Appeals, which the Texas Supreme Court refused to review, directly conflicts with settled federal maritime law and creates a revolutionary new substantive right against employers protected under the Longshoremen's & Harbor Workers' Compensation Act. As this is an important issue of federal maritime law which has not been decided by this Court, Petitioner prays that a Writ of Certiorari should

issue to review the decision of the Texas Court of Civil Appeals.

Respectfully submitted,

By: _____

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Attorney for Petitioner

Of Counsel:

FULBRIGHT & JAWORSKI

April 17, 1984

CERTIFICATE OF SERVICE

I, Gray H. Miller, hereby certify that on the 25th day of April, 1984, I mailed by certified mail, return receipt requested, 40 copies of this petition to the Clerk, U.S. Supreme Court; and mailed 3 copies by certified mail, return receipt requested, to Mr. Michael A. Orlando, Hinds & Meyer, 480 Riviana Building, 2777 Allen Parkway, Houston, Texas 77019, Attorney for Respondent.

_____

GRAY H. MILLER

APPENDIX

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IN THE SUPREME COURT OF TEXAS

February 22, 1984

No. C-2549

PORT HOUSTON MARINE, INC.

v.

DOCKSIDE TERMINAL SERVICES, INC.

From Harris County, First District

Application of petitioner for writ of error to the Court of Appeals for the First Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Port Houston Marine, Inc. pay all costs incurred on this application.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the Ctiy of Austin, this, the 22nd day of March, 1984.

/s/ GARSON R. JACKSON
Garson R. Jackson, Clerk

REVERSED AND REMANDED AND OPINION FILED JULY 21, 1983

COURT OF APPEALS
First Supreme Judicial District

OPINION

NO. 01-82-0081-CV

DOCKSIDE TERMINAL SERVICES, INC.,
Appellant

v.

PORT HOUSTON MARINE, INC.,
Appellee

Appeal from the 113th District Court of Harris County
Trial Court Cause No. 81-19839

Ralph Barrios was employed by appellee (Port Houston) on October 24, 1979, when he was injured in the course and scope of his employment while performing maintenance upon the motor vessel Laredo. He was injured when struck by a crane owned and operated by appellant (Dockside). Barrios sued Dockside for his injuries, and Dockside filed a third-party suit for indemnity, based upon an alleged implied provision in its oral contract with Port Houston. Dockside claimed it had entered an oral contract with Port Houston for Port Houston to

do certain repair work aboard the Laredo, with the agreement that Dockside would furnish a crane and crane operator necessary to perform the work. Dockside was performing maintenance on the Laredo at the time.

Dockside's agent, Captain Tong, swore that he orally agreed with Port Houston's agent for Dockside to provide a crane and crane operator for use by Port Houston in installing a crane pedestal on the Laredo. Dockside agreed to furnish the crane and operator because it was available, necessary, and would save Dockside the expense of having the crane furnished by Port Houston. Tong further testified that the usual industry practice was for the user of crane services, Port Houston, to provide a flagman to direct the movement of the crane and, because of such industry practice, it was impliedly understood by both parties at the time the contract was entered that a flagman would be provided by Port Houston. It is undisputed that no flagman was furnished, and when Barrios was injured, the crane was in use without a flagman directing its movement. Barrios alleged that the negligence of Dockside was the cause of his injuries, and Dockside, in its third party suit against Port Houston, alleged that Barrios' injury was not due to its negligence, but to Port Houston's breach of the implied requirement to furnish a flagman in the oral contract between Dockside and Port Houston.

The battle lines were thus drawn as follows: Barrios (the individual plaintiff) versus Dockside (the contractor with the motor vessel Laredo and the allegedly negligent crane operator) versus Port Houston (Barrios' employer and the alleged violator of its implied promise to provide a flagman).

Port Houston made a successful motion for summary judgment based upon the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* Port Houston specifically relied upon § 905 which has two parts, and it is unclear from the motion for summary judgment and order granting it which part formed the basis for the court's judgment. We hold, however, that neither portion of § 905 justifies a summary judgmen tin this case.

Section 905(a) prohibits actions against the employer (Port Houston) of a covered employee (Barrios) by third parties (Dockside) for damages "on account of" the injury to the employee. However, ". . . suits for indemnity that are not 'on account of' the employee's injury are not barred by § 905(a). Thus, for instance, a suit for contract-based indemnity (based on either an express or implied contract) would not be barred by § 905(a)." *Pippen v. Shell Oil Company,* 661 F.2d 378, 386 (5th Cir. 1981). "In the event of a suit by a third party (Dockside) against the employer (Port Houston) based on a contract indemnity—express or implied—the recovery against the employer (Port Houston) is not on account of the injury—it is on account of the contract of indemnity." *Pippen, supra,* at 386-87 footnote 14.

Nor does § 905(b) free Port Houston from liability. Section 905(b) bars liability of the employer (Port Houston) to a vessel only. We are not here concerned, however, with Port Houston's liability to the vessel, Laredo. We are concerned with Port Houston's liability to Dockside, and Dockside is not a vessel, nor is it the owner of the Laredo. In *Pippen, supra,* the court stated:

> In addition, it appears that an action by Shell Oil (lessee of the vessel) against Superior Electric (the employer of the injured individual, Pippen) based on an express or implied contract of indemnification is also not barred by § 905(b). That section expressly cuts off indemnity only to a "vessel" and makes no specific reference to the right of a third party nonvessel, such as Shell Oil, to bring an indemnity action against the employer. Like the Second Circuit, we would hesitate to hold that § 905(b) by its own force cuts off the availability of *Ryan* indemnity to a nonvessel in all cases where the concurring negligence of a stevedore company has caused injuries to the latter's employees, . . . for example, . . . where there is a direct contractual relationship between the third party and the stevedore, or where the third party is designated as a beneficiary of an express contract between the stevedore and the vessel. *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 721-22 (2nd Cir. 1978). Inasmuch as § 905(b) prohibits indemnity actions by vessels only, this Court would be reluctant to extend that prohibition to nonvessels.

Pippen, supra, at 386-87. Accord, *Aparicio v. Swan Lake,* 643 F.2d 1109 (5th Cir. 1981); *Holden v. Placid Oil Company,* 473 F. Supp. 1097, 1099 (E.D. La. 1979).

The *Pippen* court nevertheless affirmed an order granting summary judgment because Shell Oil, the nonvessel, third-party plaintiff suing Pippen's employer for contractual indemnity ". . . failed to offer any evidence that an express or implied indemnity existed between Shell Oil and Superior Electric." *Pippen, supra,* at 388. In this case, however, Dockside did offer evidence of an express oral contract with Port Houston. That contract allegedly included a provision, implied by industry practice, for

Port Houston to furnish a flagman. Hence, liability would attach to Dockside for any damages caused by a breach of that provision. This is evidence of an implied contract of indemnity. We have here the necessary controverting summary judgment evidence which was lacking in *Pippen*. We hold that there was a genuine issue of material fact regarding whether the alleged express oral contract between Dockside and Port Houston contained an implied provision requiring Port Houston to provide a flagman, and, in addition, that Dockside's claim is not barred by § 905 of the Longshoremen and Harbor Workers' Compensation Act.

Points of error one and two are sustained.

The judgment is reversed and cause remanded for trial

/s/ MURRY COHEN
Murry B. Cohen
Associate Justice

Associate Justices Smith and Bass also sitting.

Judgment rendered and filed July 21, 1983

No. 81-19839

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
113TH JUDICIAL DISTRICT

RALPH C. BARRIOS

v.

DOCKSIDE TERMINAL SERVICES, INC.

v.

PORT HOUSTON MARINE, INC.

ORDER

On this 18th day of October, 1982 came on to be heard the Motion for Summary Judgment of third-party defendant, Port Houston Marine, Inc., and the Court having considered said motion, the arguments of counsel and being otherwise fully advised in the premises, is of the opinion that the motion is well taken and should be granted.

It is therefore ORDERED, ADJUDGED and DECREED that the motion for summary judgment by third-party defendant, Port Houston Marine, Inc. is hereby GRANTED.

It is further ORDERED, ADJUDGED and DECREED that the third-party petition of Dockside Terminal Services, Inc. is dismissed with prejudice at the cost of third-party plaintiff.

SIGNED this 18th day of October, 1982.

/s/ JOHN RAY HARRISON
Presiding Judge